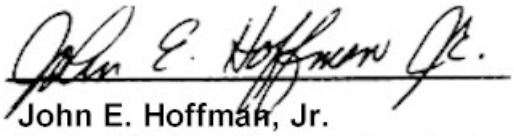



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**UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION AT COLUMBUS**

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| *In re*: | : | |
| | : | Case No. 07-50429 |
| DONALD E. ROBB and | : | Chapter 13 |
| HEIDI D. ROBB, | : | Judge Hoffman |
| | : | |
| *Debtors*. | : | |

**MEMORANDUM OPINION ON DEBTORS' OBJECTION TO PROOF OF CLAIM OF WILSHIRE CREDIT CORPORATION**

This contested matter is before the Court on Debtors' Objection to Proof of Claim of Wilshire Credit Corporation ("Objection") (Doc. 45),[1] Debtors' brief in support of the Objection (Doc. 50) and the responses (Docs. 34, 49 and 51) filed by Wilshire Credit Corporation ("Wilshire"). For the reasons explained below, the Objection is sustained in part and overruled in part.

On October 30, 2006, the Common Pleas Court of Logan County, Ohio ("Logan County Court") granted judgment in favor of Wilshire in a foreclosure action it commenced against Debtors

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[1]The Objection initially was assigned Doc. 30 but subsequently was re-docketed as Doc. 45 after a typographical error in the claim number was corrected.

in July 2006. Wilshire scheduled a sheriff's sale for January 24, 2007. On January 23, 2007 ("Petition Date"), Debtors filed their Chapter 13 petition, thereby preventing the sale. On March 15, 2007, Wilshire filed a proof of claim, designated claim number 11 ("Claim 11"), in which it asserts a claim in the amount of $98,675.43, secured in part by a mortgage on Debtors' residence ("Mortgage"). Debtors assert—and Wilshire does not dispute—that the claim is undersecured. The Objection challenges the allowability of $1,146.50 in prepetition foreclosure costs that Wilshire included in Claim 11.

Debtors' Chapter 13 plan proposes to cure the default under the Mortgage. Wilshire contends that the proposed cure makes its prepetition costs an allowable part of its claim. Wilshire bases its argument on § 1322(e), which provides in pertinent part as follows: "Notwithstanding . . . section[] 506(b) . . . if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1322(e).

Debtors assert three grounds for the Objection. First, although they do not dispute that Wilshire is entitled to reasonable foreclosure costs under the terms of the Mortgage or applicable nonbankruptcy law, Debtors argue that some of Wilshire's costs might be disguised attorney fees to which Wilshire is not entitled.[2] *See In re Tudor*, 342 B.R. 540, 545 (Bankr. S.D. Ohio 2005)

[2]Wilshire itemized the following costs: (a) $350 for "Preliminary Title Service," (b) $250 for "Filing Fee," (c) $125 for "Title Update," (d) $32 for "Record Assignment of Mortgage," (e) $17 for "Skip Trace/Investigative Report," (f) $2.50 for "Document Acquisition Cost" and (g) $270 for "Preliminary Judicial Report." Wilshire attached an invoice from its counsel listing the date on which each of these costs was incurred. Each was incurred prior to the Petition Date. Wilshire also itemized a $100 "Broker Price Opinion" obtained prior to the Petition Date on December 7, 2006. There is nothing in these descriptions that would appear to fall under the category of attorney fees, nor have the Debtors identified any specific item that should more appropriately be classified as attorney fees.

(holding that creditor is not entitled to prepetition or postpetition attorney fees in context of cure of mortgage arrearage under Chapter 13 plan). Neither Wilshire's proof of claim nor its responses are clear on whether the costs at issue were incurred by its attorneys or by others, but the costs are not disguised attorney fees in any event. *See Tudor*, 342 B.R. at 571 ("The Court finds that it is the nature of the service, rather than the identity of the person or entity who performs it, that should govern how the charge for such service is characterized. Because title work may be done by attorneys and nonlawyers alike, the Court concludes that the Costs do not constitute disguised attorney fees . . . .").

Debtors' second argument relies on *In re Evans*, 336 B.R. 749, 755 (Bankr. S.D. Ohio 2006), for the proposition that Wilshire is not entitled to its costs because its claim is undersecured. Without collateral value to secure the full amount of the claim, Wilshire does not meet the limitation imposed by § 506(b) that costs be added to a claim only "[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim . . . ." 11 U.S.C. § 506 (*i.e.*, to the extent the claim is oversecured). Wilshire does not argue that its claim is oversecured. Instead, relying on *In re Thompson*, 372 B.R. 860, 863 (Bankr. S.D. Ohio 2007) and other decisions, Wilshire contends that the "notwithstanding clause" of § 1322(e) means that the § 506(b) limitation on costs does not apply. *See also In re Larkin*, 2008 Bankr. LEXIS 1522 at **2–3 (Bankr. S.D. Ohio May 22, 2008); *Tudor*, 342 B.R. at 567.[3]

[3] In *Tudor*, it was the creditor, not the debtor, arguing that § 506(b) applies in the context of a cure under a Chapter 13 plan. The creditor took this position because its claim for attorney fees was prohibited under Ohio law and because, unlike § 1322(e), § 506(b) does not require that fees and costs be determined in accordance with applicable nonbankruptcy law. Rejecting the creditor's argument, the Court held that it "'ignores the plain language of [ ] 11 U.S.C. § 1322(e) which begins, '[n]otwithstanding . . . section [ ] 506(b) . . . of this title,' and states that the amount necessary to cure the arrears under a Chapter 13 plan is determined in accordance with both the

The Court concludes once again that the meaning of § 1322(e)'s "notwithstanding clause" is plain. And it does so based on good authority. In *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993), the United States Supreme Court analyzed the following contractual provision: "'*[n]otwithstanding any other provisions of this Contract*, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government' (emphasis added)." *Cisneros*, 508 U.S. at 18. The Supreme Court held that the effect of the notwithstanding clause was that the section in which it appeared—§ 1.9d of the contract—overrode any other conflicting provisions of the contract. "[W]e think it clear beyond peradventure that § 1.9d provides that contract rents 'shall not' be adjusted so as to exceed materially the rents charged for 'comparable unassisted units' on the private rental market—even if other provisions of the contracts might seem to require such a result." *Id.* at 18–19. In so holding, the Supreme Court reasoned:

> As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have interpreted similar notwithstanding language . . . to supersede all other laws, stating that [a] clearer statement is difficult to imagine.

*Id.* at 18 (citation and internal quotation marks omitted). *See also Larkin*, 2008 Bankr. LEXIS 1522 at *3 (applying *Cisneros* in holding that "the provisions of § 1322(e) override the provisions of § 506(b)").

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underlying agreement and nonbankruptcy law.'" *Tudor*, 342 B.R. at 567–68 (quoting *In re Hatala*, 295 B.R. 62, 69 (Bankr. D. N.J. 2003)). As the Court stated: "Based on its plain language, it is indisputable that § 1322(e), not § 506(b), governs whether the contested components of [the creditor's] arrearage claim are allowable." *Id.* at 568.

Applying the reasoning of *Cisneros*, the Court finds that § 1322(e)'s notwithstanding clause signals Congress's intention that § 1322(e) override conflicting provisions of the Bankruptcy Code, including § 506(b)'s limitation on a creditor's secured claim for costs—namely, that the creditor's claim be oversecured. If a debtor proposes to cure a default in a Chapter 13 plan, the amount necessary to cure the default includes costs determined in accordance with the underlying agreement and applicable nonbankruptcy law even if the creditor's claim is undersecured.

In addition, the costs Wilshire included in its proof of claim all arose prior to the Petition Date. There is a split of authority as to whether § 506(b) limits prepetition amounts. *See In re McKenna*, 362 B.R. 852, 855 (Bankr. N.D. Ohio 2006) ("Although there exists authority to the contrary, courts have generally held that § 506(b) is limited in its applicability to postpetition fees and charges."). *Compare In re Woods Auto Gallery, Inc.*, 379 B.R. 875, 882 (Bankr. W.D. Mo. 2007) (§ 506(b) only applies to postpetition amounts), *McKenna*, 362 B.R. at 855 (same), *In re Leatherland Corp.*, 302 B.R. 250, 258 (Bankr. N.D. Ohio 2003) (same), *In re Vanderveer Estates Holdings, Inc.*, 283 B.R. 122, 131 (Bankr. E.D.N.Y. 2002) (same), *and In re Cummins Util., L.P.*, 279 B.R. 195, 201 (Bankr. N.D. Tex. 2002) (same), *with Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308, 1314–15 (11th Cir. 2001) (§ 506(b) applies to both prepetition and postpetition amounts), *and In re Center*, 282 B.R. 561, 565–67 (Bankr. D.N.H. 2002) (same). In light of the Court's conclusion with respect to the effect of § 1322(e)'s notwithstanding clause, the Court need not decide whether § 506(b) applies to prepetition costs.

Debtors' third argument is that Wilshire may recover its costs, if at all, only by filing an application for approval of the costs under Fed. R. Bankr. P. 2016(a), which provides in pertinent part:

> An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. . . . The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

Fed. R. Bankr. P. 2016(a). The courts are split on the issue of whether a creditor seeking costs under § 1322(e) must comply with Rule 2016, or whether inclusion of the costs in the creditor's proof of claim is sufficient. *Compare In re Madison*, 337 B.R. 99, 103 (Bankr. N.D. Miss. 2006) (holding that proof of claim is sufficient in § 1322(e) context for routine claims), *with Padilla v. Wells Fargo Home Mortgage, Inc. (In re Padilla)*, 379 B.R. 643, 655 (Bankr. S.D. Tex. 2007) (requiring Rule 2016(a) application for postpetition costs).

Two factors militate against requiring a Rule 2016(a) application in this case. First, Wilshire incurred the costs prior to the Petition Date. *See In re Ransom*, 361 B.R. 895, 902 (Bankr. D. Mont. 2007) ("[A] creditor may be able to disclose all prepetition fees and costs in the proof of claim without the need to file a fee application."). In addition, the costs appear to be routine (if not entirely reasonable, an issue addressed below). *See Madison*, 337 B.R. at 103 ("[C]osts and other charges claimed by a creditor may be made in most routine circumstances through the filing of a proof of claim."). The Court, therefore, finds that Rule 2016 does not apply here.[4] But in asserting its claim for costs, Wilshire nonetheless must itemize its costs with a reasonable degree of specificity. *See Madison*, 337 B.R. at 103 (creditor's claim for costs "must be specific, i.e., the . . .

[4]In *Madison*, the court permitted postpetition costs—attorneys fees incurred in preparing the lender's proof of claim—to be included in the proof of claim.

costs and charges must be itemized so that any interested party may object if so desired."). Although Wilshire identified its costs in Claim 11 with the less-than-informative descriptions "Legal" and "BPO Fees," the costs were itemized with sufficiently specific descriptions in Wilshire's responses to the Objection.

Under § 1322(e), however, Wilshire is entitled to recover only those costs provided for in the underlying agreement. The section of the Mortgage entitled "Default" permits the mortgagee to deduct only "reasonable costs and disbursements." And in *Tudor* this Court imposed a reasonableness limitation on the recovery of costs, stating:

> Of course, the fact that Ohio law does not prohibit recovery of foreclosure costs does not give a foreclosing creditor a blank check. As Judge Aug noted in *Staud*, an attorney's charge for completing pre-foreclosure title work must be reasonable and must not exceed the cost at which the service could have been obtained from a non-attorney.

*Tudor*, 342 B.R. at 571 n.14. Thus, Wilshire may recover only its *reasonable* foreclosure costs.

Based on its knowledge of foreclosure costs and procedures, the Court finds that $776.50 of Wilshire's costs—those for Preliminary Title Service, Filing Fee, Title Update, Record Assignment of Mortgage, Skip Trace/Investigative Report and Document Acquisition Report—were reasonable under the circumstances. *See id.* at 570 (approving "[c]osts incurred for title work done by its legal counsel in preparation for the state court foreclosure action"); *In re Plant*, 288 B.R. 635, 645 (Bankr. D. Mass. 2003) (holding that fees for filing complaint, title service and recording were reasonable foreclosure costs).

By contrast, the Court finds that it was not reasonable to charge the Debtors for the Broker Price Opinion ("BPO") or Preliminary Judicial Report ("PJR"). "The BPO is a drive-by appraisal performed to give a creditor a general idea of the value of the property." *In re Marks*, 2005 WL

4799326 at *3 (Bankr. W.D. La. Nov. 30, 2005). Courts have disallowed BPO fees as unreasonable in the foreclosure context. *See In re Dean*, 360 B.R. 750, 753 (Bankr. N.D. Ohio 2006) ("[T]he Court, as unreasonable and unsubstantiated, disallowed the $170.00 'Broker Price Opinion' fee assessed by the Creditor . . . ."); *Marks*, 2005 WL 4799326 at **3–4 ("The BPO fee included in the instant case is $105.00. [The creditor] argues that the fee is necessary when a loan becomes delinquent in order to ensure that the property is being maintained and upheld and is not vacant. In addition, the creditor asserts that the BPO is necessary prior to foreclosure to ensure that the value of the property has not decreased. The court does not believe that the BPO is reasonable. The BPO is not used during the foreclosure proceeding but only by the creditor itself. During the foreclosure proceeding, an actual appraisal is obtained. The addition of fees for a drive-by appraisal which merely gives the creditor some minor comfort is not reasonable. As such, the court will not allow this cost.").

For two reasons the Court also finds that the $270 cost incurred for the PJR was not reasonable. First, Wilshire commenced the foreclosure action in the Logan County Court, which does not require a PJR but instead requires only a certification by the party requesting the sheriff's sale or by the party's attorney.[5] Second, around the same time that the PJR was performed, Wilshire

[5]*See* Rule 9 of the Rules of the Court of Common Pleas of Logan County, Ohio, available at http://co.logan.oh.us/commonpleas/court%20rules.html. *But cf.* Rule 24 of the Rules of the Court of Common Pleas of Cuyahoga County, Ohio, available at http://cp.cuyahogacounty.us/internet/localRules.aspx (requiring preliminary judicial report); Rule 11.01 of the Rules of the Court of Common Pleas of Summit County, Ohio, available at http://www.akronlegalnews.com/rules/CommonP/CPGD/cpgd_11.htm (same). *See generally* Robert M. Greggo, *Curing Title Problems*, Nat'l Bus. Inst. (2006) (available in Westlaw, at 34550 NBI-CLE 157, 159) ("Most courts require some title evidence to be filed with the court. [Some counties in Ohio] . . . require Preliminary Judicial Reports. Some counties . . . only require a title commitment."); Ernest A. Eynon, *Mortgage Foreclosures in Ohio*, Nat'l Bus. Inst. (2006) (available in Westlaw, at 25077 NBI-CLE 28, 40–41) ("The title exam or title search is essential. . . . In a

incurred $350 for "Preliminary Title Service" and $125 for "Title Update," for a total of $475 of title work. Based on its experience, the Court finds that the allowance of $475 for title work adequately compensates Wilshire for such work as was necessary under the circumstances. *See Tudor*, 342 B.R. at 570 ($450 of title costs incurred in connection with foreclosure of property was reasonable). But the $270 additional cost for the PJR—like the amount incurred by Wilshire for the BPO—was an unnecessary charge.

For the foregoing reasons, the Objection is **SUSTAINED IN PART** and **OVERRULED IN PART**. The amount of Claim 11 is reduced to $776.50.

**IT IS SO ORDERED.**

Copies to:

Debtors
Attorney for Debtors
Attorney for Claimant
Case Trustee
Office of the U.S. Trustee

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number of counties in Ohio, the examination must be in the form of a preliminary judicial report from a title insurance company which must be filed with the Complaint. In other counties . . . the attorney for the plaintiff certifies that an examination of the public records has been made to determine the ownership of subject real estate and all parties who may claim an interest therein and that, in his opinion all such parties have been named as parties to the action." (citations omitted)).